

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

No. 5:04-CR-241-FL-1  
No. 5:12-CV-287-FL

TIMOTHY LAFON MURPHY, )  
Petitioner, )  
v. )  
UNITED STATES OF AMERICA, )  
Respondent. )

**ORDER**

This matter comes before the court on petitioner's motions to vacate pursuant to 28 U.S.C. § 2255 (DE 268, 273, 277), motion to amend motion to vacate (DE 272), motion to reopen final judgment pursuant to Rule 60(b)(6) (DE 283), and the government's motions to dismiss (DE 284, 288). In accordance with 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), United States Magistrate Judge William A. Webb entered memorandum and recommendation (M&R) wherein it is recommended that the court grant the government's motion and dismiss petitioner's motion to vacate. (DE 299). Petitioner filed objection to the M&R, and the issues raised are ripe for ruling. For the reasons stated below, the court adopts the recommendation in the M&R, grants the government's motions and dismisses petitioner's motions.

**BACKGROUND**

Petitioner was indicted on July 14, 2004, on one count of conspiracy to distribute and possess with the intent to distribute both cocaine base ("crack") and cocaine, in violation of 18 U.S.C. §§ 841(a)(1) and 846. On January 13, 2005, petitioner was found guilty following a jury trial, and on July 22, 2005, he was sentenced to life imprisonment. The Fourth Circuit Court of Appeals

affirmed petitioner's conviction and sentence in an unpublished decision entered October 4, 2006. United States v. Murphy, 203 F. App'x 422 (4th Cir. 2006). Petitioner thereafter submitted a petition for certiorari to the Supreme Court of the United States, which was denied on October 1, 2007, making petitioner's conviction final as of that date. Murphy v. United States, 552 U.S. 854 (2007).

On October 20, 2008, petitioner filed his first motion to vacate pursuant to 28 U.S.C. § 2255, which the court dismissed as time-barred. The Fourth Circuit Court of Appeals dismissed petitioner's appeal on March 22, 2010. United States v. Murphy, 371 F. App'x 389 (4th Cir. 2010).

Petitioner filed his second § 2255 motion to vacate on May 21, 2012, asserting claims of ineffective assistance of counsel. On June 11, 2012, petitioner moved to amend his second motion to vacate to include an actual innocence claim based upon DePierre v. United States, 131 S. Ct. 2225 (2011). Petitioner filed a corrected amended motion to vacate with an original signature on June 25, 2012. On August 6, 2012, petitioner filed a motion to reopen final judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

## **DISCUSSION**

### **A. Standard of Review**

The district court reviews *de novo* those portions of a magistrate judge's M&R to which specific objections are filed. 28 U.S.C. § 636(b). The court does not perform a *de novo* review where a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Absent a specific and timely filed objection, the court reviews only for "clear error," and need not give any explanation for adopting the M&R. Diamond v. Colonial Life

& Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir.1983). Upon careful review of the record, “the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).

B. Objection

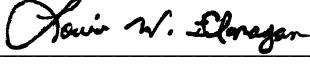
In his objection to M&R, petitioner challenges the recommendation that his motion to reopen pursuant to Rule 60(b)(6) be dismissed. Petitioner urges that he has new evidence to prove that his § 2255 motion was timely mailed, and urges that this court has jurisdiction pursuant to Gonzalez v. Crosby, 545 U.S. 524 (2005). As examined in the M&R, petitioner is seeking to re-raise an argument, as to the prison mailbox rule, already specifically considered and rejected by this court and the Fourth Circuit. M&R 7-8. The evidence that petitioner asserts is “newly discovered,” consists of alleged circumstances under which a fellow inmate helped petitioner prepare and mail his first motion to vacate. These circumstances were already expressly considered when the court dismissed petitioner’s first §2255 motion as time-barred by order entered August 17, 2009. Therefore, the court adopts and incorporates herein the reasoning in the M&R over petitioner’s objection.

### **CONCLUSION**

Upon *de novo* review of those portions of the M&R to which specific objection has been filed, and upon considered review of those portions of the M&R to which no such objection has been made, the court ADOPTS the findings and recommendation of the magistrate judge (DE 299). Consequently, the court GRANTS the government’s motions to dismiss (DE 284, 288), and DENIES

petitioner's motions (DE 268, 272, 273, 277, 283).<sup>1</sup> The clerk is directed to close this case.

SO ORDERED, this 18<sup>th</sup> day of September, 2013.

  
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LOUISE W. FLANAGAN  
United States District Judge

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<sup>1</sup> As noted in the M&R, the motions to vacate are denied without prejudice to allow petitioner to seek written permission from the Fourth Circuit to file a second or successive motion pursuant to 28 U.S.C. § 2255.